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August 25, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Secretary Caton,

Enclosed please find fourteen copies of our formal comments in reference to FCC 95-79; 60 FR 15275; "Reexamination of the Comparative Standards for New Noncommercial Educational Applicants"; MM Docket No. 95-31.

We understand that reply comments were due already. However, the Commission has not yet acted on this proposed rulemaking, and therefore, we ask that these comments be entered into the proceeding.

Thank you for consideration of our opinions and suggestions.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. Proctor".

Deborah S. Proctor
General Manager

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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AUG 29 1997

In the Matter of:

REEXAMINATION OF THE COMPARATIVE
STANDARDS FOR NEW NONCOMMERCIAL
EDUCATIONAL APPLICANTS

) FCC 95-79
) 60 FR 15275

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) MM Docket No. 95-31

Comments of EDUCATIONAL INFORMATION CORPORATION

It is a serious problem when the FCC has no standards by which to judge between several applicants for a non-commercial educational (NCE) broadcast allocation. It has been previously determined that the criteria used to select from among competing applicants for NCE facilities were vague and difficult to apply.

This proposal would benefit all small NCE entities seeking a new NCE broadcast facility by reducing and simplifying the administrative burdens associated with the comparative hearing process and would reduce such requirements by eliminating and simplifying litigation involved in prosecuting a mutually-exclusive application for a new NCE broadcast facility.

Because the Commission has not yet addressed the concerns nor formulated a policy on NCE comparative hearings, and because the Commission has left the matter pending and has not set a date when such policy formulation shall be set, we feel these comments are timely in the practical effect, even if not tendered specifically by the closing date formally indicated. Excluding these comments on this unresolved case gains nothing for the public interest or benefit, and we ask that these comments be accepted and made a part of the record.

Procedural Ramifications

Modification of Pending Cases: With respect to the procedural ramifications of applying a revised comparative analysis to pending cases, it would not be

appropriate to permit applicants in pending cases to amend their proposals in light of newly-adopted standards when further evidentiary proceedings would still be warranted. In Bechtel, the court noted that many applicants would simply amend their applications to position themselves better, with no real intent to carry out their promises.

Share Time Settlements: "Share-Time" settlements should remain an option if the parties involved wish it so. There is no reason to deny applicants this flexibility if they willingly accept it.

Buy-Out Settlements: After the comparative standards are determined and published, the Commission should allow a reasonable amount of time for existing mutually-exclusive applicants to make "buy out" offers to each other. This option should be taken only with close Commission review against abuse, but would eliminate part of the backlog of pending comparative cases.

Bechtel: The revision of the comparative analysis could be structured to satisfy the kind of concerns which, in Bechtel, resulted in determination that integration was arbitrary and capricious by considering the past history of the applicants.

In Bechtel, the Court determined that giving preference to applicants which intended to operate stations themselves, rather than through third parties, was arbitrary and capricious. This is unfortunate, as it is more likely that a station will strive to serve the public needs and convenience when the licensee himself is directly involved (integrated) into the daily management of the station.

Comparative Selection Criteria

The past history of a licensee could be used to suggest the future policy towards the Commission's intent to award the license to the party most likely to provide a public service. For instance, if a comparative hearing is between two

entities who have operated broadcast stations in the past, preference should be given to the applicant which:

- a) Broadcasts continuously, rather than "part-time".

A NCE station which is on the air continuously is more likely to be useful to the public than a service which is only on the air a portion of the time.

- b) Originates significantly more local programming, rather than importing network programming or externally produced programming;

The Commission should not concern itself with operating efficiencies through "common ownership" -- in fact, it should be discouraged in the NCE comparative process. "Common ownership" is becoming synonymous with "common neglect" -- when a licensee has thirty stations under its effective wing (including multiple corporations and legal maneuvering) it can only be expected to be concerned with centralized programming and generalizations of community needs. The State of North Carolina, many years ago, in a report to the University of North Carolina by Mr. Don Trapp, a researcher and State employee, pointed out that individual licensees could serve the State much better than "a network of stations stretching out like tentacles".

Community broadcasters, and broadcasters not affiliated with regional conglomerates and national networks are too well familiar with the notion that "bigger is better". Far too often, this is not the case. The local broadcaster, with one station, is by nature inherently more in touch with the communities served than a regional or national organization can ever hope to be. Few will argue that a small local business will not strive to give better service than a large regional chain. The more affiliates there are in a broadcasting network, the less important the individual needs of the individual community become.

- c) Utilizes a larger number of staff and volunteers at each station to provide better service and programming;
- d) Provides better equipment and production facilities at each station;

- e) Provides better and more reliable service, especially standby facilities during emergencies and natural disasters;
- f) Demonstrates substantial public support for the proposal;

When possible, the Commission should not decide close comparative cases which require a tie-breaker. The population affected by the decision should be given the opportunity to comment, and the public interest and convenience should be the deciding factor. An administrative law judge removed by hundreds or thousands of miles from the people affected is not in a position to have the best chance of weighing the options. The judge will not be affected by the results of the decision, the people in the affected areas will. Therefore, they should have a voice in the decision.

- g) Programs to the general public;
- h) Does not espouse a particular philosophy or partisan viewpoint;
- i) Continuously solicits and utilizes feedback from the listening public;
- j) Operates a smaller number of stations, thus permitting greater proportional attention to the needs of each station's individual overall audience.
- k) Proposes to upgrade an existing station, rather than create a new station.

The Commission should favor existing stations over proposed stations. It is well known that support of public radio stations is declining, and many public broadcasters are either selling facilities or going silent. When faced with a mutually-exclusive situation between a proposed NCE facility, and an existing NCE facility upgrade, the existing facility should therefore be favored, as the upgrade would enhance the ability of the existing station to continue operations.

- l) Proposed full backup auxiliary power capability

Any NCE applicant who truly wishes to serve the public will budget for full standby capability. Those who are not willing to do so are only "fair weather broadcasters" and, in a comparative situation, should not be favored.

Discouragement of Cross Filings

Abuse of Process: Some organizations which hold significant NCE and commercial broadcast interests have been involved in an unusually disproportionate number of cross-filings. When the purpose of multiple applications is partially to secure a "range of options" or to "ware-house broadcast spectrum", such activity serves little purpose other than to increase the number of comparative hearings, and to delay legitimate local organizations the access to the FM allocation which they seek.

Moreover, it has been the case that the primary purpose of a cross-filing was to delay the broadcast operations of a potential competitor, seek monetary or other gains, or to "ware-house" multiple applications to be saved for possible use in future periods. A NCE broadcaster who did just this is alleged to have said: "It's just business, and it's perfectly legal. There's nothing you can do -- I know how to make the rules work for me!"

Eliminate Cross-Filings as a "Maneuvering Tactic": Such schemes and maneuvers were not contemplated when the regulations for NCE stations were codified. Therefore, the following suggestions are offered to lessen the incentive for a such an organization to cross-file on an existing applicant, therefore:

- a) The Commission should not accept an application for changes to a non-operating facility which cross-files on another NCE application of an operating NCE broadcast facility.
- b) The ability to cross-file should not extend the time given to construct the facilities granted in the original construction permit -- in

other words, cross-filing should not "stop the clock" for required completion of construction.

c) The Commission should hesitate to grant an application to any organization which cross-filed on another NCE applicant for a NCE broadcast facility if the organization or any member of the organization which cross-files, owns any interest in any commercial broadcast facilities.

d) The Commission should hesitate to grant an application to any organization which cross-filed on another NCE applicant for a NCE broadcast facility if the corporation which cross-files, or a board member thereof, owns, or is a board member of, a corporation which owns a significant number of NCE broadcast outlets and/or construction permits and/or applications.

Holding Periods: We disagree with the idea of a "holding period" as a reliable method of "weeding-out" speculators. Instead, we feel the past history of actions of the applicants should be given close scrutiny. If the applicant has a history of multiple filings, delays in construction of granted applications, and multiple "drop-in" applications with individualized directional pattern requirements, this should indicate to the Commission that the applicant may simply be seeking open frequencies for the opportunity increased overall coverage area, without regard to the particulars of the location or the population living therein. If the opposing applicant is an existing community broadcaster, with closer "roots" to the communities to be served, it is more likely that better service will be rendered to the public at large by grant of the broadcaster with such local ties.

Point Systems: Precise numerical weighing and mathematical formulations are cumbersome and unwieldy when applied to intangibles. Assigning points to promises made by applicants vying for position is fruitless; it is akin to asking a

student if he cheated on his exam -- of course he didn't. Promises of future actions and service will be soon forgotten after the license is won. The Commission is going to have to look at the past history and the proven track record, or lack thereof, to make any reasonable judgement of future performance. Such may be cumbersome, but necessary. Much of the burden can be placed on the applicants themselves -- each should be given the ability to research fully the complete financial and business history of the other, and present findings (with documentation) to the Commission at time of review.

Discouraging "For Profit Non-Profit" Schemes

More and more individuals are applying for NCE facilities by incorporating and filing under such auspice. Done with several unrelated individuals, and operated as a community broadcaster, this is acceptable. Sometimes, however, several closely-related family members, such as a husband holding 51% voting rights, a wife holding 25% voting rights, and child holding the balance, comprise the only directors of a family-controlled, "non-profit" corporation seeking an allocation in locations remote from their residence.

Individuals and "family-held" organizations were not contemplated when the regulations for NCE stations were codified, and the relaxation of the regulations permitting unlimited number of stations owned by one individual have caused a glut of applications to be offered to the Commission. One individual with which we are cognizant, is involved with over thirty stations, a dozen organizations, some non-profit, some commercial enterprises. We do not think this is what the Commission envisioned when it said: "A non-commercial educational FM broadcast station will be licensed only to a non-profit educational organization and upon showing that the station will be used for the advancement of an educational program." (Paragraph 73.502)

Therefore, we suggest that the comparative standards which the Commission adopts should ensure that:

- a) No license of a NCE broadcast facility should be granted to any individual person.
- b) No license of a NCE broadcast facility should be granted to any for-profit entity.
- c) No license of a NCE broadcast facility should be granted to any non-profit corporation which has fewer than three board members, none of whom may be related by blood or marriage.
- d) No license of a NCE broadcast facility should be granted to any organization which has a board member who controls more than 33-1/3% of the corporation's voting rights.

Public Service During Disasters

Full Service Auxiliary Power: The availability of full service auxiliary electric power at the studio site, relay sites, and the transmitter site, should definitely be retained as a comparative criterion. This commentor installed auxiliary power at substantial cost serving the studio, the interconnecting sites, and the transmitter site. less than one year ago, Hurricane Fran struck North Carolina, and caused what local and national emergency management officials described as the most widespread power outage ever in the history of the United States.

During the hurricane itself, and for several days after, our station was the only audible broadcast signal in much of the disaster area. Out of sixty stations, only five remained on the air. Our station was the only NCE station of the five. The Emergency Broadcast System station was NOT one of them, and the State Emergency Preparedness authorities directed their updates towards our station. Several members of the public contacted us later to state that our emergency information was

responsible for saving their lives, and we received a Commendation from the Governor and from the Director of State Emergency Preparedness.

In a time when many battery operated radios are in service, the ability to stay on the air during disasters is one of the highest forms of public service. To remove auxiliary power from the comparative decision making process is a disservice to the public. It should be considered that the desire to remove emergency power from the comparative process may be spawned from the fact that applicants must pay the full cost for auxiliary power equipment, because government funding agencies (such as NTIA) will NOT consider a financial grant towards such equipment.

Coordination with State Agencies

Coordination with Statewide Plans: The Commission should examine which applicant will best integrate the station operations with the area's educational and cultural objectives. If there is a state agency concerned with public telecommunication, the Commission should seek the opinion and feedback of that state agency. In this regard, the Commission should examine which applicant will best integrate the station operations with the state's desired educational and cultural objectives. The Commission should examine which applicant presently has a reasonable process in place to determine educational and cultural needs, and has tangible evidence of having proposed services and objectives that will meet identified community needs. The Commission should favor the applicant which has objectives directed outwardly to the community of license, not exclusively to the purposes of the licensee, such as propagation of a particular philosophy or viewpoint.

History of Past Action

Timely Construction: The Commission should examine which applicant will best be able to construct and operate the proposed facilities in the most timely manner.

Special attention should be given to the financial ability of the applicant to cover the anticipated costs in a timely manner.

Personal Financial Motivations: The overall composition of, and amounts of compensations given to, members of the applicant's board of directors (for all broadcast properties held) should be thoroughly examined. Both the financial ability to construct the proposed facilities, and the financial motivation for desiring the facilities, are very relevant factors to be investigated.

Optimum use of Limited Spectrum

Spectrum Efficiency: Spectrum efficiency is a major issue of concern. "Spectrum Efficiency" has been defined by the Commission as the ratio of the service area (the listening area) of the station, to the interference area of the station (the area over which the station cannot be heard, but retains the ability to cause interference to other stations). Past Commission calculations have determined that omni-directional operation at the highest power and antenna height possible provides the best spectrum efficiency. That is, as power and antenna height increase, the service area of a full power, full height, non-directional station increases faster than the interference area.

Full Power Operations: Proposals which anticipate utilizing the full power allocated to the class of station are inherently more spectrum efficient, and to be preferred.

Use of Non-Directional Antenna: Proposals which anticipate utilizing non-directional antennas are inherently more spectrum efficient, and to be preferred.

Closing

The Commission should take steps, within the resources available to it, to ensure that the limited resources of the NCE band are allocated in way that maximizes benefit to the public. Something of this importance should not be left to chance.